In the District Court of the United States for the Southern District of New York

Civil No. 24–170

ANDREW B. CHICHTON, ET AL., DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT, ET AL., PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated August 24, 1944,[1] of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 2, 1943, under Section 207 (a) of Part II of

[1] The court on the same date rendered a written opinion, which also contained findings of fact and conclusions of law.

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the Interstate Commerce Act[2] (49 U. S. C. 307 (a)), granted the application of Associated Transport, Inc.[3] (hereinafter referred to as Associated) for a certificate of public convenience and necessity, permitting it to conduct operations as a common carrier by motor vehicle of general commodities over a prescribed route between Knoxville and Nashville, Tennessee. Appellants are competing motor carriers. An appeal to the Supreme Court was allowed October 23, 1944, and the appeal papers were served on appellees on October 25, 1944.

As appears from the decisions of the Commission and of the District Court, this case has had a rather complicated history. The Commission's final decision disposes of three applications: one filed February 11, 1936 by three brothers Jacobs, copartners doing business as Jacobs Motor Serv-

[2] The pertinent portion of this Section provides as follows:

"Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

[3] Associated, together with its predecessor, Southeastern Motor Lines, Inc., intervened as defendants in the District Court.

ice, under the "grandfather" clause[4] of Section 206 (a) of Part II of the Interstate Commerce Act; and two identical applications, filed July 16, 1938 under Section 207 (a) of the Act by Southeastern Motor Lines, Inc. All three applications, as filed, sought the right to transport general commodities between Nashville and New York City by way of Knoxville.

Concerning the "grandfather" clause application, it appears that the Jacobs commenced trucking operations between Nashville and New York in April of 1935, despite the fact that the Tennessee Railroad and Public Utilities Commission had previously denied their application for a permit to operate as a common carrier by motor vehicle in interstate commerce between Nashville and the Tennessee-Virginia State line at Bristol, Tennessee. In June 1935 one of the brothers was arrested for lack of a Tennessee permit; but the

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[4] 49 U. S. C. 306 (a). This Section prohibits common carriers by motor vehicle to operate interstate commerce without a certificate of public convenience and necessity by the Commission authorizing such operations. But the "grandfather" clause requires the issuance of such a certificate upon a showing that the applicant or its predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes for which application is made, and has so operated since that time "except * * * as to interruptions of service over which applicant or its predecessor in interest had no control." This Section further provides that, "Pending the determination of any such application the continuance of such operation shall be lawful."

State commission reconsidered its previous decision by granting the requested permit in July 1935, and service to New York hence continued. However, they made no trips after February 17, 1936, and in the following month sold all their operating rights to Hoover Lines, Inc. Although Hoover requested and received from the Tennessee Commission in March 1936 approval of its purchase of Jacobs' state operating rights, it delayed in making application to the Interstate Commerce Commission for the required [5] approval of the purchase until June, 1936. Meanwhile no operations took place over the line. On June 11, 1937 the Interstate Commerce Commission approved the purchase, but noted in its report [6] that Hoover had upon oral argument abandoned any claim to the Jacobs' "grandfather" rights between Knoxville and New York, because of another pending application [7] covering that much of the route. Shortly thereafter, in July, 1937, Hoover recommenced operations between Nashville and Knoxville. On December 2, 1937, the Commission, in consideration of Hoover's previous abandonment of any claims from Knoxville to New York, restricted the original Jacobs' "grandfather" application to operations between

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[5] By Section 213 of the Motor Carrier Act of 1935, now Section 5 of Part I of the Interstate Commerce Act (49 U. S. C. 5).

[6] *Hoover Lines, Inc.—Purchase—Jacobs*, 5 M. C. C. 97.

[7] Namely, Hoover's own "grandfather" application between those points. See 5 M. C. C. 97.

Nashville and Knoxville, and, pursuant to the mandate of Section 205 (a) (49 U. S. C. 305 (a))* of the Act regarding applications which involve operations in "not more than three States," referred the thus delimited application for hearing before a Joint Board. Such hearing was had in May 1938. In the meantime, however, Hoover had become bankrupt and sold its operating rights to Southeastern Motor Lines, the latter continuing the operations and appearing at the hearing in support of the application. On June 2, 1938, the Joint Board recommended denial of the "grandfather" application.

The two applications under Section 207 (a) seeking operating authority between Nashville and New York were then filed by Southeastern on July 16, 1938. By order of September 28, 1938 the Commission set aside its order of December

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* That Section, so far as pertinent, provides:

"The Commission shall, when operations of motor carriers * * * conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers * * * conducted or proposed to be conducted involve more than three States, refer to a Joint Board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *. The Joint Board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier * * * operations involved in such matter or are proposed to be conducted: * * *."

2, 1937, in which it had restricted the original "grandfather" clause application to operations between Nashville and Knoxville, and by order of November 8, 1938, describing the routes for which authority was sought between Nashville, Knoxville and New York, it set down for hearing before its own examiner the "grandfather" application. Subsequently, by order of March 1, 1939, the two Section 207 applications were set down for hearing before the same examiner at the same time and place.

The examiner, after a hearing from March 6–8, 1939, on March 12, 1940 issued a proposed report denying all three applications. While review of this decision was pending before Division 5, early in 1942 the full Commission approved the acquisition of control by Associated of Southeastern and other carriers.[9] Pursuant to this approval, Associated purchased, among other things, all the operating rights claimed herein and was substituted as applicant in the present case. On December 30, 1942 Division 5 issued a report and order[10] dismissing all three applications. Upon application for reconsideration, however, the full Commission issued its report and order,[11] here attacked, which reversed this determination in part and granted

[9] *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137. Such action was ultimately sustained by the Supreme Court in *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

[10] 41 M. C. C. 671.

[11] 43 M. C. C. 37.

the applications under Section 207 (a) insofar as they related to operations between Nashville and Knoxville. The denial of the "grandfather" application remained undisturbed, since the Commission deemed the cessation of operations by the Jacobs and Hoover between February 1936 and July 1937, not to have been an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of Section 206 (a) (footnote 4, *supra*). The Section 207 (a) applications were not granted as to operations between Knoxville and New York because Southeastern had already received authority to conduct such operations in separate proceedings.[12]

[12] This was under the Hoover "grandfather" clause application mentioned in footnote 7, *supra*, No. M. C. 60451, to which rights also, Southeastern, and thereafter Associated succeeded. In that case a so-called "compliance order" was first issued on September 24, 1937 directing that upon compliance with certain provisions of the Act, and unless otherwise ordered by the Commission, a certificate authorizing operations between Knoxville and New York should be issued. Upon protest of a competitor the effective date of this order was stayed by order of October 23, 1937. Subsequently, on October 3, 1938, a new "compliance order" was issued vacating the earlier "compliance order" and directing the ultimate issuance of a certificate between Knoxville and New York. On November 29, 1938 the Commission of its own motion issued a new "compliance order" setting aside the order of October 3, 1938, but granting prospective rights identical with those in that order, except with respect to service to certain intermediate points. Subsequently competing motor carriers filed motions to vacate this order, which were denied by Division 5 on June 24, 1941, and finally by the full Commission on July 6, 1942.

The basis for the full Commission's ultimate finding that public convenience and necessity required operation by Associated between Knoxville and Nashville is set forth in the following excerpt from its opinion:

> It is clear that applicant and its predecessor, Hoover, have rendered a substantial service between Nashville and eastern points through Knoxville. This service has been used by many satisfied shippers who are strongly opposed to the termination of a proven service of such long standing. Such user is indicative of a public need for the continuance of the service. We have carefully considered the record and do not subscribe to the contentions of protestants that the existing service is adequate or that applicant's service to the extent hereinafter authorized is not required by the public convenience and necessity. In this connection, we cannot overlook the fact that applicant is not a new operator; that it has built up a substantial business in a manner highly satisfactory to its customers; and that such customers have expressed a desire and need for the continuance of the service. In view of the fact that applicant and its predecessors, under color of "grandfather" rights, have been in active competition with protestants for many years, we do not believe that the latter will be materially affected by the grant of authority here made.

> As noted, Associated pursuant to the findings in *Associated Transport, Inc.—Control and Consolidation, supra* [38 M. C. C. 137], purchased among other things, all of the operating rights claimed herein. There is no evidence in this record to establish that Associated is fit, willing, and able to conduct the proposed service. However, we have no hesitancy in concluding that it is fit, willing, and able to conduct any extended operations which may be authorized herein. With a view to avoiding a further hearing in these proceedings with the accompanying inconvenience to the parties, we shall grant the authority found warranted herein to Associated.

Appellants attack the Commission's decision on three principal grounds: (1) that the applications under Section 207 (a) involved operations in "not more than three states" (*i. e.,* only from Knoxville to Nashville in Tennessee), and hence that reference for hearing before a Joint Board rather than an examiner was mandatory under Section 205 (a); (2) that the Commission erred in concluding that public convenience and necessity required these operations on the basis of past and allegedly unlawful operations; and (3) that the Commission erred in finding that Associated was "fit, willing, and able properly to perform the proposed service," when there was no evidence on that question in the present record, on the basis of its findings with respect to Associated in its

recent decision permitting that company to gain control of other carriers. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) The applications under Section 207 (a) were properly referred for hearing by the Commission to its examiner rather than to a Joint Board. Section 205 (a) (see footnote 8, *supra*) requires the Commission to refer an application for certificate to a Joint Board rather than an examiner, only when the operations proposed to be conducted involve not more than three States. It has recently been settled that, in the absence of fraud, the need for a Joint Board must be ascertained from the conditions indicated in the application rather than in the evidence at the hearing. *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448, 450 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944. Here the Section 207 (a) applications on their face, as filed, involved operations between Nashville and New York City by way of Knoxville, through obviously more than three States, so that, so far as the applications were concerned, reference to an examiner rather than a Joint Board was permissible. Appellants urge, however, that by the time, March, 1939, when the case was referred to the examiner, and heard by him, Southeastern had already in other separate pro-

ceedings [13] been granted rights between Knoxville and New York, so that all that was left here were applications involving an operation between Nashville and Knoxville in one State. But even if there had been at that time any final granting in these other proceedings of rights between Knoxville and New York, that fact would not automatically, without some further action by applicant, have resulted in a delimiting amendment of the present application. In any event, these other proceedings could not at that time have resulted in automatic amendment of the Section 207 (a) applications, since such proceedings had not then been carried to the state of finality. As indicated in footnote 12, there was then only an outstanding compliance order, entered in those proceedings on November 29, 1938. A compliance order is not necessarily a final order, but remains under the control of the Commission (*Crescent Express Lines* v. *United States*, 320 U. S. 401, 404–405) and here the "compliance order" did not become final until July 6, 1942, when, as appears in that footnote, motions to vacate were dismissed by the full Commission. Appellants assert, too, that the Section 207 (a) applications, in requesting rights between Knoxville and New York, as well as between Nashville and Knoxville, were fraudulent. There is absolutely nothing in the record to support such a contention. When the Section 207 (a)

[13] Those in M. C. 60451 described in footnote 12, *supra*.

applications were filed on July 16, 1938, there was clearly no way for the applicant to tell that it might ultimately receive rights between Knoxville and New York in these other proceedings, since there was at that time not even an outstanding "compliance order" in such proceedings.[14] To increase the possibility that it would in some proceedings secure the desired right to operate between Knoxville and New York, it was therefore natural for it to include a request for operating rights between those points in its Section 207 (a) applications.

It is significant, too, that appellants did not raise this objection in their briefs before the Commission, nor did they file any petition for reconsideration by the full Commission of its action.[15] In fact, in its reply to Southeastern's exceptions to the examiner's proposed report, appellant Super Service Motor Freight specifically took the position that consideration by the examiner rather than by a Joint Board was perfectly proper.[16] Under similar circumstances an objec-

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[14] See footnote 12, *supra*.

[15] Rule 87 of the Commission's Rules of Practice expressly provides that: "An objection not pressed in brief will be considered as waived."

[16] In its reply of May 1, 1940, p. 14, which was in the record before the court, this appellant said:

"It was the applicant itself that filed an application covering more than three states and because of this fact it was incumbent upon the Commission to assign the said application for a hearing before an Examiner * * *."

tion made to the court that the case had not been referred by the Commission to the proper hearing agency has recently been dismissed as coming too late. *Carolina Scenic Coach Lines* v. *United States* (W. D. N. C.), 56 F. Supp. — (July 21, 1944);[17] see *Chicago, St. P., M. & O. Ry.* v. *United States*, 322 U. S. 1, 3–4.

(2) Objection is equally futile that the Commission erred in determining that the public convenience and necessity required these operations on the basis of evidence of substantial, long-standing and successful past operations. Public convenience and necessity have reference to the public need for operations to insure adequate service. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 33, 45. Certainly the fact that shippers have in the past made substantial use of a carrier's facilities logically indicates that there is public need for the continuance of such operations to insure adequate service, even though the carrier cannot perfect its claim under the "grandfather" clause. The Commission's reliance on such proof here was consistent with its practice in several other persuasively reasoned recent decisions holding that where past operations have been conducted under color of "grandfather" rights, openly and without subterfuge, as was surely the case here, they are competent evidence on the issue of public convenience and necessity. *D. A. Beard Truck Lines*

[17] Now on appeal to the Supreme Court, No. 637. Defendants have also filed a motion to affirm in that case.

Co., Common Carrier Application—New Operation, 34 M. C. C. 395, 397, 416; *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points,* 42 M. C. C. 315, 332; *Fisher Common Carrier Application—New Operation,* 42 M. C. C. 695, 696–697.

Appellants urge, however, that these past operations were unlawful under the Interstate Commerce Act. They contend that when Hoover on July 1, 1937 recommended the operations, which the Jacobs had ceased on February 17, 1936, it was obvious, in view of this long interruption of service, that the Jacobs' "grandfather" claim, under which these operations were purportedly conducted, and which Hoover had acquired, was invalid. But the fact that a "grandfather" application may ultimately prove invalid is immaterial so far as the validity of the operations conducted under a pending application is concerned, for Section 206 (a) specifically provides that "pending the determination of such application the continuance of such operation shall be lawful." Furthermore, the Commission's decision permitting the acquisition of the Jacobs' "grandfather" rights by Hoover (5 M. C. C. 97, 100) specifically found that Hoover was also to acquire the "right to operate between Nashville and Knoxville pending determination of the 'grandfather' application of said Jacobs Motor Service." In any event, the mere fact that past operations may have been in

violation of law has been held not necessarily to prevent them from supporting rights, even under the "grandfather" clause, where actual past "bona fide" operation is required. *Alton R. Co.* v. *United States,* 315 U. S. 15, 24.

Since there was thus a rational basis and substantial evidence to support the Commission's finding of public convenience and necessity, that finding, as the District Court appropriately held, was conclusive. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 42; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 143–146; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944; *Kansas City and Leavenworth Transportation Co.* v. *United States,* 51 F. Supp. 916, 921 (D. Del.).

(3) As to appellants' third contention, it is sufficient, in disposing of that, to quote the portion of the District Court's decision dealing with that question:

> Although the Commission found that Associated was "fit, willing, and able properly to perform the service proposed," as required by § 207 (a), there was no evi-

dence [18] regarding the matter in the record. Instead, the Commission supported its finding by reference to the recent thorough investigation of Associated which it had conducted during the 1942 control and consolidation proceeding. *Associated Transport, Inc.—Control and Consolidation, supra.*[19] This was the identical procedure followed by the Commission in its earlier decision in *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points, supra,* 42 M. C. C. at page 317. Plaintiffs here were parties to the consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp.* v. *West Virginia Pulp & Paper Co.,* 2 Cir., 141 F. 2d 1; *Goldstein* v. *Groesbeck,* 2 Cir., 142 F. 2d 422, citing *National Fire Ins. Co. of Hartford* v. *Thompson,* 281 U. S. 331, which collects the Supreme Court cases; and the

[18] There was, however, evidence of fitness and ability on the part of Southeastern, including a financial statement (Tr. 97), proof of compliance with the Commission's requirements as to insurance and safety (Tr. 121-2), and testimony as to the adequacy of equipment (Tr. 308).

[19] In that report (38 M. C. C. 137, 173) the Commission found that Consolidated, pending determination of the "grandfather" applications of the carriers consolidated into it, might continue such operations, which would include the present operations. It further found that the issuance of certain stock was necessary or appropriate for and consistent with the proper performance by Consolidated of service to the public as a common carrier, and would not impair its ability to perform that service.

> Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case.[20]

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1944.

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[20] It is significant, too, that appellants do not actually challenge Associated's ability to perform this service. Such a challenge would apparently be futile, as Associated from a revenue standpoint is now the largest single motor carrier in the country. See *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 71.

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